1952

Dean E. Conder v. University of Utah et al : Brief of Plaintiff

Utah Supreme Court

Arthur H. Nielsen; Counsel for Plaintiff;

7863

IN THE SUPREME COURT OF THE STATE OF UTAH

DEAN E. CONDER,

Plaintiff,

vs.

UNIVERSITY OF UTAH, a body corporate and politic and WILLIAM J. O'CONNOR, WARD C. HOLBROOK, CLARENCE BAMBERGER, ADAM S. BENNION, HEBER BENNION, ALBERT R. BOWEN, WALTER E. COSGRIFF, LeROY H. COX, REED C. CULP, SPENCER S. ECCLES, RICHARD L. EVANS, MRS. J. L. GIBSON, FULLMER H. LATTER, ORRICE C. McSHANE, and A. RAY OLPIN, acting as the BOARD OF REGENTS of said University,

Defendants.

Case No. 7863

PLAINTIFF'S BRIEF

ARTHUR H. NIELSEN
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PLAINTIFF'S BRIEF

STATEMENT OF FACTS

This action was commenced by plaintiff as a resident and taxpayer of the State of Utah for the purpose of challenging the proposed action of the Board of Regents of the University of Utah of entering into a loan agreement with the United States Government for financing the construction and furnishing of two dormitory buildings to house male students attending the University.

While the plaintiff in this matter is not adverse to the improvement of the University by the construction of new buildings for the purposes indicated, he nevertheless on behalf of himself and other residents and citizens of the State is interested in seeing that any action taken by the Board of Regents for the financing of such construction

(particularly where the amount involved will approximate the sum of $1,000,000) shall be done strictly in accordance with the provisions of applicable statutes and under constitutional authority. Because of the position taken by our Supreme Court in the past with reference to projects of a similar nature where an attempt has been made to avoid the provisions of our State Constitution and where the theory of the "Restricted Fund Doctrine" has been attempted to be extended to various types of financing of public construction, it is of extreme importance that the proposed project in this case be scrutinized by our Supreme Court and the method of financing either approved or rejected in order that the applicable constitutional provisions be adhered to and the financing of the construction of new buildings, if in fact they are to be constructed, meets all of the tests of constitutionality and validity.

As was the situation in the case of State v. Candland, 36 Utah 406, 104 P. 285, the Legislature of the State of Utah set the stage for the litigation. In 1947 it passed an Act purporting to authorize and empower the University of Utah to borrow money and to issue bonds for the purpose of constructing, maintaining and equipping buildings to be used in connection with educational purposes and authorizing the financing thereof out of student fees or "from other sources other than by appropriations by the Legislature of the State of Utah to such issuing institutions and in anticipation of the collection of such income and revenues to issue negotiable bonds in such amount as may, in the opinion of the Board be necessary for such purpose." (Sec. 2, Chap. 126, Laws of Utah 1947) This Act, however, by its own terms further provided that the bonds issued in connection therewith "shall not be an indebtedness of the State of Utah

or of the institution for which they are issued or the Board of Regents or the Board of Trustees thereof, but shall be special obligations payable solely from the revenues to be derived from the operation of the building and student building fees, etc., and the Board is authorized and directed to pledge all or any part of such revenues to the payment of principal of and interest on the bonds." (Ibid. Sec. 3) As will be seen hereinafter, such a provision is not a declaration that the obligation incurred under this Act is not a general obligation of the State of Utah but is a requirement by the Legislature of the state institution that the obligations incurred by the latter shall not in their nature be general obligations of the State of Utah. Such provision is in effect a mandate to the Board of Regents in the instant matter to comply with all constitutional and statutory provisions, as they have been interpreted and construed by the Supreme

Court. Therefore, the plan of financing must be such as to bring it within the "special fund doctrine" as announced and upheld by our Supreme Court on numerous occasions. The Board of Regents was further authorized under the legislative enactment to "make covenants other than and in addition to those herein expressly mentioned of such character as may be considered necessary or advisable to effect the purposes of this Act." (Ibid. Sec. 3 (11)).

Following the enactment of this legislation, the Utah State Agricultural College proceeded to adopt a plan for the issuance of revenue bonds to finance the construction of a student Union Building on the U.S.A.C. campus. Under that plan student fees were to be charged and all income derived from the operation of the building pledged to the repayment of the indebtedness incurred for the construction and equipping of such building. This

plan obtained sanction and approval of the Supreme Court in the case of Spence v. Utah State Agricultural College (Utah 1950) 225 P. 2d 18. But, as will be seen hereinafter, the case is not determinative of the issues involved here for the reason that the plan of financing was entirely different and the items which in the opinion of the plaintiff make the proposed plan in the instant case objectionable were not involved.

On or about the 10th of March of 1952, the Board of Regents of the University of Utah purporting to act for and on behalf of the University, passed a resolution whereby the University of Utah was authorized to enter into a loan agreement with the Government of the United States for the sale by the University and the purchase by the Government of certain revenue bonds in the principal sum of $1,000,000. As previously stated, the revenue to be derived from the bond issue was to be used for

constructing, equipping, and furnishing 2 men's dormitory buildings, including cafeteria and other facilities. The proposed contract to be executed on behalf of the University of Utah is attached to plaintiff's petition on file herein and among other things provides as to the security which shall be given for the payment of the bonds:

Paragraph 2 (i)

> "Special obligations of the Borrower payable as to both principal and interest on and secured by a first and exclusive lien from the net revenue and income derived from the operation of the Project, and additionally secured by a first and exclusive lien on the interest and income derived by the Borrower from the Land Grants described in Section 5 of Article X of the Constitution of Utah to the amount and extent necessary, together with the net revenue and income derived from the operation of the Projects, to enable the Borrower to deposit annually the sum of $50,000 in the Bond and Interest Sinking Fund Account described in Section 9 hereof."

Thereafter plaintiff filed this action directly in the Supreme Court seeking to restrain the

University of Utah and the Board of Regents thereof from proceeding to follow out the plan of financing set forth in said proposed loan agreement. Among other things the petition alleges that the indebtedness to be created by the loan agreement "does and will constitute and create a debt within the meaning of the provisions of Sec. 2, Article XIII, and Sec. 1, Article XIV of the Constitution of the State of Utah" that the legislative enactment of 1947 if it be construed as authorizing in incurrence of such indebtedness, would be unconstitutional and void. Plaintiff further alleges that any attempt to pledge, as security for the repayment of the indebtedness, income to be derived from the funds identified and known as Land Grant Funds, would be wholly without authority of law and in violation of Sec. 5, Article X of the Constitution of the State of Utah. The final issue raised by the petition is to the effect that at all

events the Board of Regents of the University of Utah is not validly constituted so as to have authority to contract with the Federal Government for the loan in question.

The defendants appeared and filed a motion to dismiss on the grounds that the petition failed to state facts upon which relief could be granted, thereby admitting the statements of fact set forth in petition by challenging the sufficiency of such facts to authorize the Court to declare the proposed action unconstitutional and void.

STATEMENT OF POINTS

In their brief heretofore filed, defendants have set forth five points under which the foregoing issues of law raised by the petition are argued. In order to meet the contentions of defense counsel, plaintiff submits the following points as being determinative of the issues here involved:

I

THE PROPOSED BOND ISSUE IN THE INSTANT CASE IS IN DEROGATION OF THE "RESTRICTED SPECIAL FUND THEORY" HERETOFORE ADOPTED BY THE SUPREME COURT.

II

THE PROPOSED PLAN OF FINANCING IS ANALOGOUS TO THE PLAN OF FINANCING REJECTED BY THIS COURT IN THE CASE OF STATE V. CANDLAND. (36 Utah 406, 104 P. 285.)

III

IN ORDER TO APPROVE THE PROPOSED LOAN AGREEMENT IT WILL BE NECESSARY FOR THIS COURT TO REPUDIATE THE "RESTRICTED SPECIAL FUND THEORY" HERETOFORE ADHERED TO BY IT.

IV

INTEREST FROM THE UNIVERSITY'S LAND GRANT FUND CANNOT LAWFULLY BE USED FOR THE PURPOSES CONTEMPLATED.

V

THE PURPORTED BOARD OF REGENTS OF THE UNIVERSITY OF UTAH IS NOT LEGALLY CONSTITUTED SO AS TO HAVE AUTHORITY AND POWER TO CONTRACT FOR THE INDEBTEDNESS PROPOSED.

ARGUMENT

I

THE PROPOSED BOND ISSUE IN THE INSTANT CASE IS IN DEROGATION OF THE "RESTRICTED SPECIAL FUND THEORY" HERETOFORE ADOPTED BY THE SUPREME COURT.

We agree with counsel for the defendants that the facts of this case differentiate it from the case of Fjeldsted v. Ogden City, 83 Utah 278, 28 P. 2d 144, in that in the instant case the proposed obligation is one contemplated on behalf of the University of Utah, while in the Fjeldsted case the proposed bonds were to be issued by a municipality. Such a distinction between a state institution and a municipality was recognized by this Court in State v. Candland, supra, wherein was stated that "we cheerfully concede that county, city, and school district debts are not State obligations, and do not come within the constitutional inhibition." However, in that case the Supreme Court

in passing upon whether or not the University of Utah, as a State agency, was separate and apart from the State so as to be able to incur an indebtedness which was not an indebtedness of the State further held: (104 Pac. 285 at 294)

> "The legal effect of the act of 1909, so far as it affects the relations of the university and the state, may be said to be that while the obligation authorized by the act is in terms made the debt of the university, yet, in the same act, the university is entirely absolved from the duty and burden of paying it, while the state is made to assume this duty, and is thus made the real debtor. If this be so, it becomes entirely immaterial whether the board of regents executed the notes provided for in the name of the university or not. The state must, nevertheless, pay both the principal and interest of those notes, if they are paid at all. These notes, therefore, both in law and fact, are state obligations."
> (italics added.)

Even though the instant matter involves a state institution while the Fjeldsted Case related to a municipality, the question presented is the same, namely: whether the contempled indebtedness

is a debt within the meaning of the applicable provisions of the Constitution prohibiting such debt to be contracted. Section 9 of Article XIII of the Constitution of Utah provides that "No appropriation shall be made, or any expenditure authorized by the Legislature, whereby the expenditure of the State, during any fiscal year, shall exceed the total tax then provided for by law, and applicable for such appropriation or expenditure, unless the Legislature making such appropriation, shall provide for levying a sufficient tax, not exceeding the rates allowed in Sec. 7 of this Article, to pay such appropriation or expenditure within such fiscal year."

While a different section of the Constitution applies as to indebtedness of municipalities, nevertheless the foregoing constitutional provision, as well as Section 1, Article XIV, cited in Plaintiff's petition, contains a similar restriction as to an

indebtedness of the State of Utah. In the very recent case of Spence v. Utah State Agricultural College, supra, the Court assumed that "if the bonds are an obligation to the State their issuance would be prohibited by the constitutional provisions."

Plaintiff concedes that if the indebtedness to be incurred is to be paid exclusively out of a special fund derived from the operation of the project in payment of which the money obtained from the bond issue is used, then and in that event it is not a general obligation but, as stated by counsel for defendants, is payable out of a special fund. However, as the Supreme Court stated in the Fjeldsted Case if the indebtedness was intended to be paid not only from the improvement to be made by the proposed indebtedness but also from the operation of other facilities which had theretofore been acquired, such payment would not qualify to avoid

the constitutional prohibition. So, in the instant case the fact that the payment of the proposed bonds will be guaranteed from the interest or revenues derived from the Land Grant Fund, would likewise seem to throw out the theory that that indebtedness is authorized under the "Restricted Special Fund Theory."

II

THE PROPOSED PLAN OF FINANCING IS ANALOGOUS TO THE PLAN OF FINANCING REJECTED BY THIS COURT IN THE CASE OF STATE V. CANDLAND. (36 Utah 406, 104 P. 285.)

It is plaintiff's contention that the proposed plan of financing the construction of buildings by the University of Utah falls squarely within the interdictions announced by the Supreme Court in the case of State v. Candland, supra. In that case the Court went to some length to analyze the situation presented as to whether the State of Utah would at any time be called upon to pay the indebtedness.

In making its analysis, it called attention to the fact that the proceeds from the Land Grant Fund would not be sufficient to maintain the University of Utah and that therefore the Legislature had the obligation of augmenting such funds to the extent necessary to pay all of the operations of the University not otherwise provided for. So, in the instant case if the Land Grant Funds are used for the purpose of guaranteeing the payment of the obligation to the United States Government, any money taken from the University's funds in order to satisfy such guarantee would cast upon the State Legislature the burden of augmenting such funds or of providing the additional funds necessary to operate the University of Utah. This would in effect be an obligation of the State of Utah because the depletion of one reserve would of necessity require the University of Utah to make up such deficiency by way of a general

appropriation. This, in our opinion, would constitute the obligation proposed a general obligation of the State of Utah and therefore make it prohibited by the constitutional provisions referred to.

The case of Arnold v. Bond, 47 Wyo. 236, 34 P. 2d 28, cited by defendants in their brief is distinguishable in that the legislature there specifically authorized the payment of the indebtedness from the income to be derived from the Land Grant Funds in question. Thus, the proposed indebtedness had specific legislative sanction which was persuasive of the interpretation that the proposed plan of financing would not create an indebtedness of the state. Even in that case, however, the Court said:

> "The argument that the taxpayers of the state will be compelled to make up the principal and interest paid out of the loan has, of course, force from a practical standpoint and cannot be overlooked. Theoretically, the legislature may, or may not, appropriate out of the general

funds or otherwise the amount so to be paid. It is not theoretically compelled to do so. Of course, if a proposed loan were of such amount that as a result of it the legislature would practically be compelled to make up the payments under the loan by taxation in order that the University might be able to function as such in a reasonable way, a different question would arise, and we should probably not be warranted in that case to waive aside the objection here discussed merely because of the theoretical side of the question."

In the instant case we have a loan of $1,000,000. The income from the Land Grant Fund is pledged to the extent of $50,000 per year. This amount would be sufficient alone to make all of the payments required to be made under the loan agreement in the event the other source of income failed. At the same time it would require the Legislature of the State of Utah to increase the general appropriation to the operations of the University of Utah by a sum equivalent to the amount that would be required to be deposited out

of the Land Grant Fund, or compel the University to restrict its activities to that extent. Since the other sources of income to the University are taken into consideration by the Legislature in fixing the amount of its appropriation, it would seem that the taxing of this source of revenue by pledging it as security for the payment of the indebtedness would correspondingly increase the burden of supporting the University program to the taxpayer by requiring the Legislature to augment its appropriation to the extent necessary to continue the operation of the school.

Nor can it be argued that the reasoning of the Court in the Candland Case should be ignored because of being dicta. The same analysis was used in the later case of Wadsworth v. Santaquin City, 83 Utah 321, 28 P. 2d 161, where the problem of financing improvements to the waterworks system of the community was involved.

The Court there stated:

> "The waterworks system of Santaquin City was purchased out of tax revenues and belongs to the city. Its taxpaying citizens have a direct pecuniary and beneficial interest in the maintenance and operation of the system, and are entitled to be relieved of taxation to the extent of any profits which may accrue thereby. When all or part of the net revenues from the system are diverted to a special fund to pay bonds issued for any purpose, a burden is thereby cast on the taxpayers to the extent of such diversion. Undoubtedly any waterworks revenue already collected, or which may be reasonably anticipated to be collected in any year, is subject to be expended for any lawful purpose by the city commission in its discretion, but, when future revenue is pledged to pay a presently created obligation, it is the same as pledging revenue of the city which it may obtain by taxation or otherwise in future years."

For the foregoing reasons and for the reason set forth in the Candland Case to the effect that it will be necessary for the State of Utah to make up any deficiency arising from the operation

of the school, plaintiff submits that the proposed plan of financing is invalid.

III

IN ORDER TO APPROVE THE PROPOSED LOAN AGREEMENT IT WILL BE NECESSARY FOR THIS COURT TO REPUDIATE THE "RESTRICTED SPECIAL FUND THEORY" HERETOFORE ADHERED TO BY IT.

It is plaintiff's position in this matter that unless the Court desires to overrule the principles announced in both the Candland and Fjeldsted cases based upon the "Restricted Special Fund Doctrine" it cannot approve the plan proposed by the University of Utah. If such doctrine is repudiated, then independently of the statutory provisions of the Act of 1947 the proposed plan of financing is valid and will not be objectionable unless the University cannot impose an obligation on the Land Grant Fund for the purpose of constructing buildings for University purposes. However, we desire to call attention to the fact that in the many cases in

which this "Restricted Special Fund Theory" has been presented, the Court has never felt inclined to modify or change its previous decisions. In the case of Fjeldsted v. Ogden City, 84 Utah 302, 35 P. 2d 825 (being the second appeal of the case by the same name heretofore referred to) the Court again considered the matter of the Special Fund Doctrine in the following language:

> "Wisely or otherwise the Barnes Case 74 Utah 321, 279 P. 878 opened the door of the special fund doctrine. Part of the court thinks the door should not have been opened at all, part that it should have been opened but not so widely, hence the limitations imposed by the later cases. The difficulty before the court in these cases would have been avoided had the door of the special fund doctrine not been opened at all. Having been once opened the court must now meet the difficulties of the problem and new legislation in the light of the decided cases and the effect to be given the new legislation."

Again in the later case of Utah Power & Light Company v. Ogden City, 95 Utah 161, 79 P. 2d 61, the Court made the following observations:

"We are earnestly urged to reconsider and repudiate the special fund doctrine of our previous decisions. We have no disposition to do so. The principles upon which it rests have been repeatedly examined by this court. It is now firmly established and supported not only by our own repeated decisions, but by the overwhelming weight of authority in our sister states. A citation of many of these will be found in our previous decisions, supra. We can allot space for but a few of the more recent cases. Exhaustive citation would be impossible and unnecessary."

We recognize that the many cases cited by the Court in the Spence Case have repudiated the restriction on the "Special Fund Doctrine" heretofore imposed by the decisions of this Court. We submit with the defendants that the only jurisdictions, other than Utah, still adhering to the restricted view are: South Dakota (Hesse v. City of Watertown, 57 S.D. 325, 232 N.W. 53); Georgia (Dortch v. Southeastern Fair Ass'n., 182 Ga. 683, 186 S.E. 685); and Ohio (State ex rel. Public Institutional Bldg. v. Griffith, 135 Ohio State 604,

22 N. E. 2d 200). See the annotation on this subject in 146 A. L. R. 328, relating to municipalities and other political subdivisions.

In the Griffith Case the Court was concerned with a proposal to issue bonds to construct new buildings and improve already existing buildings, but pledging income to be derived from the operation of all for the payment of the bonded indebtedness. In holding the contemplated plan to be unconstitutional, the Court stated in its syllabus:

> "Bonds issued pursuant to and based upon a resolution of the Public Institutional Building Authority of the state, authorizing the issuance of its revenue bonds for the construction of any buildings or additions to buildings on income-producing state property, payable from rentals derived from such state property, and a contract between the building authority and the Department of Public Welfare whereby the promises of the latter to pay to the former rentals sufficient to service such bonds solely from income or revenue derived from the operation of such buildings and properties, old as well as new, create an indebtedness of the state

within the meaning of the debt limitations of the Constitution and are therefore void."

A similar situation was presented to the Rhode Island Supreme Court in Re Opinion to the Governor, R.I. , 169 Atl. 748. There a state emergency public works corporation was formed pursuant to statute to work with the Federal Government on emergency relief. The state proposed to pledge its property to secure the payment of indebtedness incurred in improving such property. In its opinion to the Governor the Court held:

> "A charge upon the property of the state is, to all practical intents and purposes, a debt of the state. A state need not pledge its property. It can borrow, without pledge or security, ample funds for its needs through bond issues properly authorized. It is inconceivable that the state of Rhode Island would fail to redeem public property necessary in the conduct of its manifold activities. Furthermore, section 13 of said article 4 provides also, 'nor shall they [the general

assembly in any case, without such consent pledge the faith of the state for the payment of the obligations of others.' It is our opinion that if property of the state is pledged as security for a loan to the Rhode Island Emergency Public Works Corporation, 'the faith of the state' is pledged, at least to the extent of the value of the property pledged or conveyed, 'for the payment of the obligations' of another."

IV

INTEREST FROM THE UNIVERSITY'S LAND GRANT FUND CANNOT LAWFULLY BE USED FOR THE PURPOSES CONTEMPLATED.

Whether the income from the University's Land Grant Fund can lawfully be used for the construction of the buildings in question is, of course, governed by the interpretation to be given to the provisions of Section 8 of the Enabling Act and Section 5, Article X of the Constitution. Section 8 provides that the proceeds from the sale of lands described in that section "shall constitute permanent funds, to be safely invested and held by said State, and the income thereof to be used exclusively

for the purposes of such University and Agricultural College." While the pertinent part of Section 5, Article X of the Constitution changes the language of the Enabling Act by stating that the income shall be used exclusively "for the support and maintenance of the different institutions and colleges," we agree with counsel for Defendants that the additional expression "in accordance with the requirements and conditions of said Acts of Congress," does not justify any different interpretation. See Arnold v. Bond, supra.

The Supreme Court of Idaho was concerned with the interpretation of almost identical provisions of Admission Act of Idaho, when it decided the case of Roach v. Gooding, 11 Idaho 244, 81 P. 642. Section 8 of the Idaho Admission Act stated "the proceeds shall constitute a permanent fund to be safely invested and held by said State, and the income thereof to be used exclusively for

University purposes." In construing this provision the Supreme Court of Idaho held:

> "Counsel for plaintiffs further contend that the words 'university purposes,' as used in section 8 of the admission act, include the erection of buildings. We cannot agree with that contention, as the provisions of that section must be construed in connection with the other provisions of said act, taking them all together. It is clear that it was not intended to permit the interest or income from such funds to be used in the erection or equipment of buildings. As we view it, the 'purpose' of the university is not in any sense the erection or equipment of buildings therefor. As is clearly shown from the various acts of Congress from that of July 2, 1862, including the act of February 18, 1881, and the amendments thereof, and the acts of admission, admitting many states into the Union, the general attitude and policy of Congress has been to provide an endowment fund for educational purposes; the income thereof only to be used to support the institution, leaving the people of the state to furnish the buildings. Observation and experience have shown that the inclination of the several Legislatures has been to use a great portion of such grants to erect magnificent buildings for school purposes, regardless of the necessity for such buildings."

This interpretation of the expression, "support

and maintenance" was upheld later by the Idaho Supreme Court in the case of Independent School District v. Pfost, 51 Idaho 240, 4 P. 2d 893, 84 A.L.R. 820, where the Court held that neither principal nor income from the school fund could be used to provide transportation for students. Under the constitutional provision, the principal of the funds could not be used at all, while the interest "may only be used for the maintenance of the school."

To the same effect is the holding of the Supreme Court of Washington in the early case of Sheldon v. Purdy, 17 Wash. 135, 49 P. 228.

In our exhaustive research on this point we have found no recent cases where the same interpretation of the phrase "support and maintenance" has been rendered, although we have two cases which held that the term "support and maintenance" authorized the erection of buildings: Davis v. City

of Tuscumbia (Ala.) 183 So. 657; Meredith v. Board of Public Instruction, (CCA5) 112 Fed. 2nd 914. We submit to the Court the question of whether income from the University Land Grant Fund may be pledged to secure the payment of an indebtedness incurred for the erection of buildings for the University's purposes.

V

THE PURPORTED BOARD OF REGENTS OF THE UNIVERSITY OF UTAH IS NOT LEGALLY CONSTITUTED SO AS TO HAVE AUTHORITY AND POWER TO CONTRACT FOR THE INDEBTEDNESS PROPOSED.

While there is some question whether the Board of Regents of the University of Utah is legally constituted so as to be able to contract with respect to the matter in issue, Plaintiff recognizes that the recent decision of this Court in the case of Spence v. Utah State Agricultural College, supra, in effect disposes of Plaintiff's claim that such Board has no power to act on behalf of the University. Insofar as

Plaintiff has been able to ascertain, the same statutory provisions apply to the Board of Regents of the University of Utah as apply to the Board of Trustees of the Utah State Agricultural College. Therefore, unless the Court desires to review this question and to reverse its former decision to the effect that the "Board of Trustees is legally constituted," Plaintiff concedes the power of the Board of Regents to act at least in a "de facto" position.

CONCLUSION

In conclusion, Plaintiff respectfully requests the Court to review not only the decisions of State v. Candland, supra, and Fjeldsted v. Ogden City, supra, but other cases cited involving the "Restricted Special Fund Theory." In the event the Court does not extend the special fund doctrine to include also other special funds not forming a part of the general appropriation, it would appear to

Plaintiff that the present contemplated action of the Board of Regents in pledging the income from the University Land Grant Fund would be in violation of the constitutional and statutory provisions in this case.

Respectfully submitted,

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